UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALSTATE MAINTENANCE, LLC

and Case No. 29-CA-117101

TREVOR GREENIDGE, an Individual.

RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), Respondent Alstate Maintenance, LLC ("Alstate" or "Respondent") respectfully submits this Answering Brief to General Counsel's Exception and Brief in Support of Exceptions. As set forth below, Administrative Law Judge Raymond P. Green's ("ALJ Green") determined correctly that Trevor Greenidge did not engage in protected concerted activity when he refused, without reason, to assist airline customers with their luggage. Thus, the decision dismissing the Amended Complaint and Notice of Hearing should be upheld.

PROCEDURAL HISTORY

As set forth more fully in the record, Mr. Greenidge filed an unfair labor practice charge (Case No. 29-CA-117101) on or around November 13, 2013, alleging Respondent violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA") by discharging Greenidge in retaliation for his protected concerted and other union activities.

On June 27, 2014, the Regional Director for Region 29 of the National Labor Relations Board ("Region 29") dismissed the charges filed against Alstate. Following an appeal by Mr. Greenidge, the Regional Director issued a Complaint and Notice of Hearing in Case No. 29-CA-117101 ("Complaint"), alleging Alstate terminated Mr. Greenidge's employment in retaliation for his comment "that the amount of tips received for performing services to a certain customer may be unsatisfactory," in violation of Section 8(a)(1) of the Act. (GC Ex. 1).[1]

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[1] "(Tr.__)" refers to pages in the official transcript of the instant unfair labor practice proceeding held before the Board. "(GC Ex.__)", "(R Ex.__)" and "(J Ex.__)" refer to General Counsel's, Respondent's and Joint Exhibits, respectively. "(Local 660 Ex.__)" refers to documents submitted by Local 660 in the related matter. "(ALJD __)" refers to ALJ Green's June 24, 2016 decision. "(GC Br. __)" refers to General Counsel's Brief in Support of Exceptions.

Respondent filed an Answer denying the substantive allegations, and denying further that the Board has jurisdiction over Respondent, asserting that it was a subject to the exclusive jurisdiction of the Railway Labor Act ("RLA") on December 10, 2014. (GC Ex. 1).

On December 19, 2014, Acting Regional Director for Region 29 issued an Order Further Consolidating Cases and Notice of Hearing, consolidating this case with Case Nos. 29-CA-104000, 29-CA-126794, 29-CV-103994, 29-CB-126867 and 29-CA-136782. (GC Ex. 1). On March 3, 2015, the Regional Director severed the above cases from this case. (GC Ex. 1).

A hearing on the Complaint was held before Administrative Law Judge Raymond Green on May 22 and June 18, 2015 and on February 23, 2016. On June 24, 2016, ALJ Green issued a decision dismissing the Complaint in its entirety.[2]

STATEMENT OF THE CASE[3]

I. RESPONDENT'S BUSINESS.

Alstate Maintenance, LLC contracts with Terminal One Management, Inc. (referred to also as "TOGA")[4] to provide skycap, wheelchair, baggage handling and passenger representative services to airlines at John F. Kennedy International Airport, Terminal One.[5] (Tr. 144, 180).

II. OVERVIEW OF ALSTATE'S SKYCAP SERVICES.

Alstate's skycaps are responsible for transporting airline passengers' luggage from the sidewalk outside Terminal One to their respective airline ticket counter. (Tr. 30).

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2 ALJ Green held Alstate fell within the Board's jurisdiction in a separate case (Case No. 29-CB-103994).

3 Except where noted, all citations are to undisputed facts.

4 TOGA is a partnership of several airlines operating out of Terminal One, including Lufthansa, Air France, Korean and Japan Airlines. (Tr. 180).

5 Alstate also provides services at Terminal Four. (Tr, 144).

Skycaps are stationed "on the curb," meaning they stand on the sidewalk outside the Terminal's doors – which Mr. Greenidge estimated to be somewhere between three (3) and twenty (20) feet – and wait for passengers to request assistance. (Tr. 58). The sidewalk itself is not large – Mr. Greenidge estimated it to be somewhere between three and twenty feet. (Tr. 58).

On certain occasions, an airline representative will instruct Alstate's skycaps to wait at the curb to greet and assist a particular group of passengers' upon the passengers' arrival. (Tr. 5, 169, 181). General Counsel's contention that "[i]n these circumstances skycaps do not generally deal with individual passengers and they would rely on the airline for their tip," is entirely unsupported by the record.[6] (GC Br. 3). While Counsel for General Counsel asked Mr. Greenidge whether skycaps received tips from the airline (as opposed to a passenger) in those situations where the airline directed Alstate's skycaps to attend to specific passengers or baggage, she subsequently withdrew the question. (Tr. 46).[7]

While it is customary for skycaps to receive tips, Mr. Greenidge confirmed that it is the skycaps responsibility to help every customer, "regardless of tip or not." (Tr. 59).[8]

III. THE EVENTS OF JULY 17, 2013.

On July 17, 2013, Lufthansa Airlines Station Manager Isabelle Roeder informed TOGA Manager on Duty Klaudia Fitzgerald that a German soccer team traveling on Lufthansa "required assistance because they were traveling with equipment." (Tr. 168). Ms. Fitzgerald

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6 General Counsel does not cite to any portion of the record in support of this claim. (GC Br. 3).

7 Specifically: "Ms. Breslin: And those cases – it's your testimony that the Ticket Agents would give you or somebody from the airlines would give you a tip? Mr. Greenidge: Yes. Mr. Bogaty: Objection. Ms. Breslin: Fair enough – I was just trying to clarify. Judge Green: I mean – it may be that somebody from the airline transmits the tip. I don't think that Lufthansa budgets to give tips to the people. Ms. Breslin: *I withdraw.* I just wanted to clarify. That's fine. Judge Green: I mean – I could be wrong about that. Maybe they're extremely generous. Ms. Breslin: *I don't think we know the answer to that question.* I just wanted to clarify." (Tr. 46) (emphasis added).

8 General Counsel's citation to an investigation by the New York State Attorney General into certain of Respondent's pay practices is irrelevant and should be disregarded by the Board. The investigation was predicated largely on Alstate's use of the tip credit. At no point did the Attorney General allege (let alone find) that the skycaps wages, when combined with their earned tips, fell below the applicable minimum wage.

subsequently contacted Crawford, an Alstate supervisor, to "make sure" the four skycaps on duty – Terrance Boodram, Basil Rodney, Allan Wills and Mr. Greenidge – were waiting at the terminal curbside to assist with the passengers' luggage *when the passengers arrived at the Airport.* (Tr. 34, 41, 181-82; ALJD 2:20-23). Mr. Crawford, relayed this instruction to Mr. Greenidge, Rodney and Mr. Wills.[9] Id.

As it was a "very slow evening," the four skycaps already were stationed in front of the terminal "awaiting [other] passengers." (Tr. 33). Despite this – and despite Ms. Fitzgerald's and Mr. Crawford's clear instructions – none of the skycaps were waiting to assist the Lufthansa passengers upon arrival, nor did the skycaps attempt to assist the passengers after they arrived. (Tr. 169; ALJD 2:26-29). Notably, Mr. Greenidge was not assisting another customer, and observed the truck arrive. (Tr. 71). After realizing the skycaps were not assisting the passengers as requested, Ms. Roeder tried fruitlessly to "wave at the skycaps," but they were "walking away and didn't come back." (Tr. 169-170; ALJD 2:26-28 ("despite being waved over, they walked away")). After this attempt at getting the skycaps' assistance failed, Ms. Roeder contacted Ms. Fitzgerald to inform her that "there was nobody outside willing to help bring the bags in." (Tr. 181).

Ms. Roeder waited with the soccer team's managers outside the terminal. (Tr. 170). A few minutes later, "[Mr. Crawford] came out and he went to the skycaps to speak to them." After speaking with the skycaps, Mr. Crawford approached Ms. Roeder and the soccer team's managers and stated the skycaps "don't want to take care of the equipment" because they did not believe they would receive a high enough tip. (Tr. 170-171, 182). Ms. Fitzgerald then joined Ms. Roeder, Mr. Crawford and the soccer team's managers outside, at which point she

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[9] Mr. Boodram denies learning of the assignment from Mr. Crawford. (Tr. 105, 109).

learned from Mr. Crawford that the skycaps were refusing to assist Lufthansa and the soccer team's passengers. (Tr. 182). Unfortunately, Mr. Crawford's explanation of the skycaps' behavior proved to be largely gratuitous, as Ms. Fitzgerald observed personally one skycap "two or three feet away [from where Ms. Fitzgerald was standing] . . . just not approaching" and two others "walking away from us." (Tr. 182-83; ALJD 2:26-29). Mr. Greenidge, who was *fifteen feet away* from Ms. Fitzgerald, Ms. Roeder and Mr. Crawford, observed Ms. Fitzgerald, Ms. Roeder and Mr. Crawford's discussion, but nonetheless refused to approach or otherwise assist them.[10] (Tr. 36, 170-171, 182). Ultimately, the skycaps ignored Lufthansa's passengers for a long enough period of time that the soccer team was able to remove between *fifty and seventy* pieces of baggage and oversized equipment from their truck and line the baggage and equipment on the Terminal's curb. (Tr. 182, 189).

General Counsel attempts to distinguish between the passengers' personal baggage and their equipment, perhaps to imply Mr. Greenidge assisted the soccer team with some, if not all, of their luggage. (GC Br. 4). The distinction is irrelevant and again unsupported by the record. Multiple witnesses – including General Counsel's witness Terrance Boodram – confirmed that the soccer team's "bags" included "sports equipment, regular suitcases and . . . duffle bags." (Tr. 110); *see also* Tr. 181 ("I saw the soccer players were almost finished removing all of their baggage along with the equipment and it was already lined up neatly on the curbside."); Tr. 188 ("I think it was a combination of the equipment and their regular bags."). In fact, Mr. Greenidge's own affidavit attests that "On July 17th, 2013 at around 6:00 p.m. a little

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[10] Mr. Greenidge denies that the truck had arrived during this conversation. (Tr. 36). Nonetheless, Ms. Roeder and Ms. Fitzgerald confirm that the truck already had arrived. (Tr. 170-171, 182). Further, Ms. Fitzgerald stated that, of the four skycaps working that shift, she knew only "Mr. Wills." (Tr. 183). When asked if Mr. Wills was among the skycaps "standing on the curb not assisting . . . [or] walking away from you," Ms. Fitzgerald stated "I don't recall. *I don't think so.*" (Tr. 183). Notably, Greenidge admits that Ms. Fitzgerald also waved at him (though Greenidge and Counsel for General Counsel characterized the gesture as "waving . . . in an outward motion"), to which he did not respond. (Tr. 37).

truck pulled up and they told us that a truck with some equipment for a soccer team would be arriving for Lufthansa Airlines," while he testifies that he was told to assist with the soccer team's "bags" and that he unloaded "bags . . . it was duffel bags." (Tr. 198-199).

Given the skycaps demonstrated refusal to perform their job duties and assist the soccer team passengers, Ms. Fitzgerald "instructed Crawford to pull baggage handlers from inside of the building" to assist with bringing the soccer team's bags into the terminal – despite the fact baggage handlers do not have the same job duties as skycaps and are "contracted for a totally different purpose." (Tr. 182). These baggage handlers – who were the first Alstate employees to assist the soccer team passengers – transported the first two carts of bags and equipment. (Tr. 183). Only after the baggage handlers began transporting the soccer team passengers' bags did Mr. Greenidge and the other skycaps begin assisting Lufthansa as requested. (ALJD 2:34-36) ("The result was that Alstate brought in a group of baggage handlers to do the work and only after the baggage handlers started bringing in the luggage, did the skycaps begin to assist the customer."). Despite the substandard service, Lufthansa gave the skycaps an $83 tip. (Tr, 44-45, J Ex. 1).[11]

Later that night, Ms. Fitzgerald reported the incident *via* e-mail to Alstate's General Manager Deb Traynor and Assistant Manager Vince Orodisio, as well as to TOGA Executive Director Ed Paquette, as "it's part of [her] job description . . . [to document] any type of sub-standard service." (Tr. 183). Further, Ms. Fitzgerald believed the incident "was really

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[11] The skycaps did not share the tip with the baggage handlers. (Tr. 115). It is unclear if General Counsel's statement that "There is no evidence that baggage handlers received a tip for assisting with the job" is intended to imply that the baggage handlers did not actually assist with the soccer team's luggage and thus were not entitled to a tip. To the extent that was the implication, Respondent notes that Mr. Greenidge himself admitted the baggage handlers assisted with the soccer team's luggage. (Tr. 42) ("I look around and I see the Baggage Handlers coming out to load up their carts."). The skycaps failure to share the tip with the baggage handlers is evidence of nothing more than the skycaps inexplicable refusal to share the tip with their coworkers who actually performed their work.

rather embarrassing *because we've never experienced somebody totally denying to provide the service.*" (Tr. 184) (emphasis added). Ms. Fitzgerald described the incident as follows:

> As you may be aware, a French soccer team is travelling [*sic*] on LH405 tonight and on behalf of Lufthansa, we had requested skycap services. There were no issues with the soccer team players regular baggage as they dropped them off directly at the pit, however, the equipment was a totally different story. At approximately 1900hrs, we were advised by LH that the truck with the equipment was stuck in traffic and wasn't going to arrive for at least another hour, but at 1920 LH ASM Isabelle informed that [*sic*] the equipment should be arriving in the next five minutes. I requested assistance from Crawford via radio to mobilize all the sky caps so that they are standing by. I observed only one skycap standing outside, but not assisting the soccer team and LH ASM Isabelle. I proceeded outside and at this point Crawford was explaining to Isabelle that the skycaps don't want to handle it because of the large quantity of bags and a small tip. I interjected and instructed Crawford to get all the skycaps on departures by revolver #2 to handle these bags immediately. As per Crawford and LH Isabelle, Wills was one of the skycaps who refused to assist and eventually showed up after being called on the radio for the third time. I believe Crawford will fill you in with the additional details as to who were the other employees and supervisors being uncooperative. In attempt to compensate for the mishandling, I asked Crawford to send over few [*sic*] baggage handlers to assist and Crawford went above and beyond to do so. One of the soccer coaches said to LH ASM that they might as well handle these bags themselves. Even after providing this substandard service, the skycap captain received a tip from LH Isabelle. I'm wordless; how service provider [*sic*] employees don't comprehend their job descriptions, why they have jobs and would refuse to provide skycap services to a partner carrier or any customer for that matter. I must say that in my entire professional career I have never been this embarrassed in front of the customer and I expect that you thoroughly investigate and take appropriate action immediately. I had personally apologized to LH ASM Isabelle on behalf of Terminal One and Alstate, but would highly suggest that you do the same.

(J Ex. 1).

At 5:28 the next morning, Mr. Paquette emailed Alstate Chief Operating Officer Alfred DePhillips; Terminal One President Arthur Mollins; Air France Board of Directors

Member Jacques Malot; Korean Airlines Board of Directors Member Jang Schoi; and, Lufthansa Regional Manager Margaret Eaton, to demand Alstate provide an explanation for the skycaps' "unacceptable and embarrassing" behavior *and to demand that each of the skycaps be removed from Terminal One. Id.*

Concerned, Mr. DePhillips instructed Ms. Traynor to conduct an investigation to identify the skycaps involved; and, given Mr. Paquette's instructions to remove the skycaps from Terminal One, terminate their employment. (Tr. 148). Mr. DePhillips – the undisputed sole decision-maker – decided to discharge the skycaps, including Mr. Greenidge, because: (1) Mr. Paquette instructed he do so; (2) the skycaps failed to perform their job duties; and, (3) Alstate's customer – TOGA – was "extremely embarrassed" by the skycaps' refusal to assist Lufthansa's passengers. (Tr. 149-150).

The following day – July 19, 2013 – Ms. Traynor contacted Mr. Greenidge (who was not working) and requested he come to the Airport for a meeting. (Tr. 52). During that meeting, Ms. Traynor informed Mr. Greenidge that his employment with Alstate was terminated, and that the Company already had discharged Mr. Wills, Mr. Rodney and Mr. Boodram. (Tr. 53). "[S]he said that she went and watched a video [and] that [the] skycap did the job in record time. And she also said that she told the material [*sic*] and the terminal told her that they don't care. The airline was embarrassed they want all of the skycaps fired." *Id.* At no point during this meeting did Ms. Traynor mention Mr. Greenidge's purported comments about tips, nor did she indicate Alstate was discharging Mr. Greenidge because of the alleged comment. (Tr. 52-53).

Mr. Greenidge received subsequently a written letter from Ms. Traynor confirming Mr. Greenidge's termination of employment. (Tr. 51). Mr. DePhillips did not

instruct Ms. Traynor to draft the letter, nor did Mr. DePhillips review or otherwise approve the letter before it was sent to Mr. Greenidge. (Tr. 50).

Dated July 19, 2013, the letter summarizes the July 17th incident as follows: "You were indifferent to the customer and verbally make comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [*sic*] in front of the other skycaps, Terminal One Mod and the Station Manager of Lufthansa." (J Ex. 2). It goes on to note that Mr. Greenidge previously had received counseling in response to complaints that skycaps were inattentive and "not proactive" and reminds Mr. Greenidge that, less than two years prior, he received a written warning for failing to assist a wheelchair patient. *Id.* Ms. Traynor thus informs Mr. Greenidge that, in light of this demonstrated pattern of poor performance and established indifference to serving Alstate's customers, Alstate was terminating his employment with the Company, effective immediately. *Id.* At no point in this letter does Ms. Traynor write (or imply) that Alstate was discharging Mr. Greenidge because he discussed his tipped wages with coworkers or with his supervisor. *Id.*

To the extent General Counsel contends that "[t]he ALJ . . . found that Respondent explicitly discharged Greenidge and his colleagues because 'of their refusals to perform their duties and the comments made about tipping'" this selective quotation of a partial sentence in the decision misrepresents ALJ Green's actual finding, which was that the discharge letter sent to Greenidge stated "You were indifferent to the customer and verbally make comments about the job stating you get no tip or it is very small tip" and that **"[t]he letters given to the other skycaps also indicate that the reason for the discharges was** because of their refusals to perform their duties and the comments made about tipping." (ALJD 4:38-44) (emphasis added). In other words, ALJ Green's determination was limited solely to the content

of the discharge letters – which, as an undisputed fact, were not reviewed by or prepared at the direction of the decision-maker – he did not determine that the letters accurately reflected Respondent's actual reason for discharging the skycaps, nor did he hold that Respondent discharged the skycaps, in whole or in part, because of the purported comment about tips.

Contrary to General Counsel's assertion, Respondent did not "return Boodram, Wills and Rodney to work but refuse[] to return Greenidge to work." (GC Br. 9) (capitalizations reformatted). *Respondent* did not return Boodram, Wills or Rodney to work at all. While ALJ Green noted it "appear[ed] that after a period of time, the other three skycaps [i.e., Boodram, Wills and Rodney] were offered jobs at the Respondent's sister company, Airway Cleaners", *Airway is not a party to this case*. Moreover, there is no evidence that Alstate exercised control over Airway's hiring decisions or otherwise acted in concert with Airway to hire Boodrom, Wills and Rodney. Nor is there evidence to suggest that *any* Alstate representative – including, but not limited to, Mr. DePhillips – participated or had any role in the decision to hire Boodram, Wills or Rodney.[12] In fact, the only evidence of Airway and Alstate's relationship is a comment by Respondent's counsel that the companies have "some common ownership."[13]

General Counsel – who did not proffer a single piece of evidence regarding the relationship between Airway and Alstate – cannot link Airway's decision to hire the three (3) skycaps to Alstate, nor can the Board, in the absence of any evidence, infer a retaliatory or unlawful motive from Airway's decision not to hire Greenidge. It should be noted that General Counsel had ample opportunity to pursue some connection between Alstate's decision to

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12 To that end, Mr. Boodram (who, like, Mr. Wills and Mr. Rodney, was hired as part of a grievance settlement procedure) admitted that, upon his hire by Airway, he completed new hire paperwork, has a new supervisor and has different job responsibilities. (Tr. 133).

13 General Counsel characterizes the relationship as having "common ownership," omitting the significant modifier of "some". (GC Br. 9).

discharge the four (4) skycaps involved in the Lufthansa incident and Airway's decision to hire three (3) of the skycaps as part of settlement negotiations with the employees' bargaining representatives. He did not. General Counsel chose not to question Mr. DePhillips about the two companies, his role in Airway Cleaners or his participation (if any) in hiring Boodram, Wills and Rodney.

If General Counsel wished to pursue a failure to hire claim against Airway – which General Counsel has not alleged, let alone proven, is a joint employer with Alstate – he should have done so. To imply baselessly now that Airway's actions are indicative of Respondent's intent is a red herring argument that must be ignored.

Regardless, General Counsel cannot argue that Airway's decision to hire Boodram, Wills and Rodney is evidence of retaliatory animus towards Greenidge for his purported tip-related comments, while simultaneously arguing that "Respondent believed that Greenidge *and his fellow skycaps* acted in concert to address their common concern about tips . . . Respondent discharged all four skycaps at the same time because of 'some conversion [sic] about no tip or small tip for the job . . . In no uncertain terms, the discharge documents attribute this conversation *to the group of skycaps* and not to Greenidge." (GC Br. 23) (first emphasis added, second in original). If, as General Counsel contends, Respondent believed that the skycaps *as a group* were discussing their tips, any subsequent decision to hire three (3) of the four (4) skycaps would be evidence that Respondent did *not* harbor a retaliatory motive – not the other way around.

ARGUMENT

I. ALJ GREEN HELD CORRECTLY THAT THE CHARGING PARTY DID NOT ENGAGE IN ANY PROTECTED, CONCERTED ACTIVITY.

The Act is not a shield protecting employees from any and all actions or misconduct. Rather, the Act protects only the rights of employees "to engage in . . . concerted activities for the purpose of collective bargaining *or other mutual aid or protection.* To be protected, therefore, employee activity must be both 'concerted' in nature and pursued either for union-related purposes aimed at collective bargaining or for other 'mutual aid or protection.'" *See, e.g., Republic Aviation Corp.*, 324 U.S. 793 (1945). Here, the only allegedly protected concerted activity in which Greenidge engaged was his statement to Crawford (upon learning that Lufthansa had requested skycap assistance for the soccer team) that "We did a similar job a year prior and we didn't receive a tip for it." (Tr. 34). While General Counsel attempts to characterize this as a rallying cry for skycaps' wages, ALJ Green held correctly that this "offhand gripe" was neither protected nor concerted. This holding is well-reasoned and should be upheld.

A. ALJ Green Held Correctly That Mr. Greenidge's Comments Were Not Concerted.

To establish conduct was "concerted," General Counsel must show that the employee engaged in or affirmatively sought to initiate, induce or prepare for group action. *Meyers Industries*, 281 NLRB 882, 887 (1986). "'Mere griping' of employees, without the intent to engage in further action, is not protected." *Mushroom Transportation Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). ALJ Green determined General Counsel did not meet this burden, as Mr. Greenidge's offhand remark about not receiving a tip from a customer the

previous year was not intended to induce or prepare group action and thus was not concerted. (ALJD 6:45-48).

General Counsel's argument that Mr. Greenidge's comment was concerted because it was made "in front of other skycaps and his supervisor" misconstrues the established facts and misapplies the relevant law. (GC Br. 15). First, it has not been established that Mr. Greenidge made the alleged comment to any other skycaps, as General Counsel's own witness, Mr. Boodram, denied that Mr. Greenidge made *any* comment regarding his tips. (Tr. 108-110). Second, Respondent disputes that "Greenidge's comment prompted the skycap supervisor to intercede on behalf of the *group* of skycaps . . ." (GC Br. 15) (emphasis added). Mr. Crawford informed Alstate's customers that the skycaps refused to do their jobs because they thought the soccer team would tip poorly. He did not "intercede" – he communicated the skycaps inappropriate, insubordinate and insulting message to Alstate's customers.[14]

1. Mr. Greenidge Admitted His Comment Was Not Concerted.

Regardless, whether the alleged comment was made in front of other skycaps or whether Mr. Crawford "interceded" on the skycaps behalf is irrelevant in light of Mr. Greenidge's undisputed admissions that: (1) he did not make the comment out of fear that the skycaps would not receive a tip for the July 17th assignment (Tr. 75); (2) he did not make the comment to protest the assignment (Tr. 74); and, (3) he did not make the comment to induce any type of change to Alstate's policies or procedures (Tr. 75). By his own admission, Mr. Greenidge's comment was not a "spontaneous complaint" intended to "protest changes to employment terms common to all employees." *Whittaker Corp.*, 289 NLRB 933, 933-34 (1998) (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918-19 (3d Cir. 1976)).

[14] Moreover, and as discussed in more detail below, Mr. Crawford communicated an unlawful and unprotected threat of a partial strike, which is not itself protected activity.

2. General Counsel's Argument That Respondent Perceived Mr. Greenidge To Have Engaged In Concerted Activity As A Result Of The Email Complaints Received By Ms. Fitzgerald And Mr. Paquette Is An Implicit Acknowledgment That Respondent's Knowledge Was Limited To Believing Mr. Greenidge Threatened An Unlawful Partial Strike.

Alternatively, General Counsel contends that Respondent *believed* Mr. Greenidge acted in concert with his fellow skycaps, and thus his conduct was protected as perceived concerted activity. Again, General Counsel's argument fatally is flawed, as there is no evidence in the record to suggest that Respondent was aware Mr. Greenidge – or any of the skycaps – stated "we did a job like this last year and we didn't get a tip." The undisputed evidence, including the testimony and emails cited by General Counsel as proof that Respondent believed the skycaps acted in concert, establishes that Respondent knew only about the skycaps refusal to assist the Lufthansa passengers and of Mr. Crawford's explanation for the refusal, i.e., that the skycaps "don't want to handle it because of the large quantity of bags and no tip." (GC Br. 23).

Even assuming Respondent attributed this comment to the skycaps (and not to Mr. Crawford) – which General Counsel did not establish – such conduct is an unlawful threat of partial strike, not protected concerted activity. Employees "cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected." *Audubon Health Care Center*, 268 NLRB 135, 136 (1983). Accordingly, employees who threaten or engage in a partial strike" – i.e., a strike in which "employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises . . ." lose protection of the Act. *Id.*, *see also Vakkey City*

Furniture Co., 110 NLRB 1589, 1592 ("[T]hreatening to engage in a partial strike [is] an activity long considered outside the protection of the Act.").[15]

B. ALJ Green Held Correctly That Mr. Greenidge's Comments Were Not Protected.

Assuming the Board disregarded ALJ Green's finding that Mr. Greenidge's conduct was not concerted, his comment nevertheless was not made to seek mutual aid or protection and therefore is not protected. It is well-established that, to be for the purpose of mutual aid or protection, "concerted activity must seek to 'improve terms and conditions of employment or otherwise improve [employees'] lot as employees." *Dignity Health d/b/a St. Rose Dominican Hospitals*, 360 NLRB No. 126, slip op. at 8 (2014) (quoting *Eastex v. NLRB*, 437 U.S. 556 (1978)). Here, Mr. Greenidge's comment was not related to the terms and conditions of his employment, and, even if it was, was not made for the "benefit of all his fellow employees." *Id.* at 11.

1. Comments About Customer Tips Unrelated To The Employer's Control Over Same Are Not Related To Employees' Terms And Conditions Of Employment.

Regardless of whether skycaps received a substantial amount in tips, the record is clear that Respondent has no control or influence over a customer's decision to tip a skycap. Thus, Greenidge's comment that he on one occasion assisted an airline customer without receiving a tip is not related to the skycaps' terms and conditions of employment and not protected by the Act. (ALJD 7:5-10).

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[15] The email does not state or imply that the skycaps threatened or engaged in an actual work stoppage – just that the skycaps refused this particular assignment. (J Ex. 2). Moreover, Mr. Greenidge testified he was "on the curb awaiting passengers" from the time Mr. Crawford informed him of Lufthansa's request for skycap assistance until the time he began actually assisting with the soccer team's luggage. (Tr. 33).

General Counsel points to two cases in support of his argument that "[t]ips, like wages, are directly connected to terms and conditions of employment." Neither case, however, stands for this proposition. Rather, in both *Fairmont Hotel Co.*, 230 NLTB 874 (1977) and *Skyline Lodge, Inc. d/b/a Edward's Rest. & Lounge & Phyllis Delaney*, 305 NLRB 1097, 1098 (1992), the Board held that an employer's *control* over the method and means by which employees received tips was a term and condition of employment, and thus concerted activity regarding such control may be protected by the Act. These cases do not hold (and cannot be interpreted to hold) that comments about tips are *per se* related to wages or the terms and conditions of employment.

The employee in *Fairmont* – a bellman by the name of Steven Gardner – was fired after complaining to his supervisor about the Hotel's procedures and practices regarding "pre-tipped" conventions. *Fairmont Hotel Co.*, 230 NLRB at 874. Unlike other events, where guests tipped the Hotel's bellhops individually, organizers of pre-tipped conventions entered into a contract with the Hotel to tip the bellmen a certain, pre-determined rate for each guest staying at the Hotel. *Id.* at 875. The Hotel's process for "paying out" the bellmen at the end of a convention "varie[d] with the situation," but, with the exception of the gross amount, always was within the Hotel's – not the customer's – control. *Id.* On some occasions, the rate was divided equally among all the "rank-and-file bellmen." *Id.* On other occasions, the doormen and bell captains were included. *Id.* And on other occasions, the bellmen were paid according to the number of guests they individually checked-in. *Id.* To determine the number of guests served, the bellmen submitted their "gold slips" – a ticket from the guest folio that the bellmen received upon checking in a guest (regardless of whether the convention was pre-tipped or not). *Id.* The gold slip did not indicate whether a particular convention was pre-tipped, nor did it indicate

whether the bellmen would be "paid out" based on the number of gold slips they retained. *Id.* Regardless of the method of pay out, however, the Hotel's established practice was for the supervising bell captain to calculate and distribute the tips in the presence of a rank-and-file bellman. *Id.*

After checking in a number of guests at a particular convention, Gardner learned that the convention was pre-tipped, and that the pay out would be calculated based on each bellman's gold slips. *Id.* at 876. Gardner complained to various members of Fairmont's management that a number of the bellmen were unaware of the pre-determined tipping arrangements, and thus had thrown away their gold slips. *Id.* Gardner continued to complain as the Hotel delayed paying out the tips for almost a week, "repeatedly complain[ing to management] about the lack of advance notice of the pretip arrangements and also about the delay in consummating the paid-out." *Id.* Gardner also complained about the tip amount the Hotel had negotiated with the convention organizers. *Id.* at 878.

Shortly thereafter, Gardner discovered that a convention at which he was working was pre-tipped – one day *after* the convention began. Gardner complained again that he had thrown away gold slips and "claimed the bellmen were being screwed again as they had on the [previous] convention." *Id.* at 876. Gardner continued to complain upon learning that the supervising bell captain had removed the gold slips from the premises and was calculating the pay out "away from the hotel and without the customary participation of a rank-and-file bellman." *Id.* He subsequently was discharged for, *inter alia*, insubordination.

General Counsel is correct that, in finding Gardner's complaints were protected concerted activity, the Board held "the subject matters which he took up with management were topics of common interest and concern to all rank-and-file employees . . . because they directly

related to the amount of their pay, procedures for settling the amount, and the time of payment." *Id.* at 878. What General Counsel fails to acknowledge, however, is that the "subject matters" of which Gardner complained did not include the amount of tips he received (or did not receive) from a particular customer, but rather the Hotel's calculation and distribution of tips, as well as the Hotel's failure to inform employees of certain pre-determined tipping procedures. In other words, the Board in *Fairmont* did not hold that Gardner's complaints were protected because he complained about tips and *tips* are "directly related to the amount of [employees' pay]." The Board held Gardner's complaints were protected because Gardner complained about how the *Hotel's actions* affected the amount of tips he received and the method by which he received them.

Skyline Lodge also involved an employer's *control* over employee's tips, and neither holds nor implies that conversations about tips automatically are considered protected conversations about wages. There, a restaurant server's complaint that manager was "cheating" employees out of tips by distributing tips to the wrong server – along with complaints about unfair distribution of work; inadequate staffing; and, the quality and fairness of her supervisors – was protected concerted activity as "these matters directly affected their earnings and the amount of work required of them." *Skyline Lodge*, 305 NLRB at 1099. As with *Fairmont*, these comments were not protected because they were about tips, they were protected because they pertained to the *employer's actions* – i.e., misattributing tips – and how such actions affected their earnings. *Id.* at 1099.[16]

While the above review of *Fairmont* and *Skyline Lodge* clarifies that the Board never has held that tips alone are a term and condition of employment, it is not Respondent's

[16] To be analogous to the case at hand, the restaurant server in *Skyline Lodge* would have had to been discharged after refusing to serve a customer because she had served a similar customer the year prior and not received a tip.

position that comments or conduct regarding employee tips categorically are excluded from the Act's protection. To the contrary, Respondent admits that an employer's control over or influence on an employee's tips (i.e., negotiating a contractual gratuity rate; requiring employees "pool" tips; distributing tips amongst employees, etc.) could be a term and condition of employment. Mr. Greenidge's comment, however, did not relate to Alstate's control over or involvement in the tipping process. He did not, for example, complain that Alstate withheld information about the tipping process, failed to provide skycaps with tips in a timely manner or calculated skycaps' tips in a manner inconsistent with their established practice (as in *Fairmont*), nor did he complain that Alstate was miscalculating or "cheating" him out of earned tips (as in *Skyline Lodge*). He remarked only on his beliefs that a group of people would be poor tippers. There is no precedent to support the argument that this remark was protected.[17]

Nevertheless, General Counsel urges the Board to find that customer tips (like wages) automatically and indisputably relate to an employee's terms and conditions of employment. (GC Br. 15). While General Counsel's position places understandable import on the often significant role tips play in the lives of this country's numerous tipped employees, it ignores the key distinction between wages and tips: wages are almost always within the employer's control. Tips are not.[18] The Board extends such deferential status to comments and

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[17] General Counsel argues that the tips received by skycaps were related to the terms and conditions of employment because "skycap Boodram testified that Respondent supervisor [*sic*] Crawford, and not a customer, presented him with the $83.00 tip to distribute among skycaps." (Tr. 45). First, this is inconsistent with Mr. Greenidge's testimony, as he testified that he received the tip form Mr. Boodram, who Mr. Greenidge believed collected the tip from "one of the Lufthansa Agents." (Tr. 44-45). Regardless, even if the skycaps did receive their tips directly from Alstate, this would be irrelevant absent a complaint about Alstate's control over or process for collecting and distributing the tips, *which Greenidge did not make.*

[18] General Counsel argues at length that ALJ Green's decision is "unbelievable" in light of General Counsel's urging that ALJ Green "take judicial notice of a New York Attorney General's investigation that concluded that Respondent's skycaps earned less than the legal minimum wage between 2008 and 2014." Whether Respondent did or did not comply with the tip credit requirements of the New York Labor Law is irrelevant, however, *as Mr.*

discussions about wages *because* of the Board's belief that wages tightly are controlled by employers – thus, employee discussion and comment about wage rates often is a necessary precursor to any action or change. *Parexel Int'l*, 356 NLRB No. 82, slip op. at 3 (2011) (noting that discussions about wages are often the "precursor to organizing and seeking union assistance") (internal citations omitted). By contrast, a customer's decision to tip is within the sole discretion of that customer. An employer has no more control over a customer's tipping practice than an employee does. The Board cannot and should not conflate the two simply because they both involve money.

In a final attempt to connect discretionary customer tips to the skycaps terms and conditions of employment, General Counsel argues that:

> The instant record contains ample evidence that there was a direct and immediate relationship between the tips earned by Respondent's skycaps – which constitute the lion's share of skycap wages – and the work that they were assigned to do. Every minute that skycaps spent assisting the soccer team with its equipment was a minute that they were not available to earn tips by assisting individual passengers with their bags. Greenidge testified about that in 2012, he and other skycaps were similarly directed to perform a 'special job' for Lufthansa Airlines. There, skycaps were required to transport over sixty (60) pieces of baggage from the curb through security. The job took them away from their normal curbside post for over two hours. The fact that they received no tip for the job meant that the only wage that they earned for those two hours was their subminimum hourly wage.

(GC Br. 18).[19] The fundamental flaw with this assertion, however, is that the potential for tips had no actual bearing on a skycap's work tasks or assignments. Skycaps never were guaranteed tips and could not decide "at the curb" to ignore a particular customer out of concern that the customer may not tip or may not tip well. (Tr. 59). Rather, Mr. Greenidge, like all skycaps, was

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Greenidge did not complain about wages he received from Alstate. Mr. Greenidge's remark about a customer's likelihood to tip does not gain protection solely because Alstate later admitted to certain wage and hour violations.

[19] It should be noted that Mr. Greenidge testified the night of July 17th was "very slow, yes . . . that day in particular was very slow." (Tr. 71). Moreover, *Mr. Greenidge received a tip for assisting the soccer team passengers.* Thus, "every minute [he] spent assisting the soccer team" was a minute *he actually was earning tips.*

required to provide his services upon request, regardless of whether the customer decided ultimately to tip and regardless of whether the skycap suspected the customer would not tip. (Tr. 59; GC Ex. 22, ¶2.2 (setting forth specific script and procedures for Alstate skycaps to follow)). In other words, the skycaps' "job was to help all people, regardless of tip or not." (Tr. 59).[20]

2. In The Event Discretionary Customer Tips Were Considered Related To The Terms And Conditions Of The Skycaps' Employment, Mr. Greenidge Nonetheless Did Not Seek Mutual Aid Or Protection.

Despite General Counsel's attempt to characterize this as a rallying cry for skycaps' wages, ALJ Green held correctly Greenidge's comment was an "offhand gripe" – neither protected nor concerted. Not only did Mr. Greenidge not make the alleged comment for the "benefit of all his fellow employees," he denied emphatically making the comment out of concern the skycaps would not receive a tip for the July 17th assignment and confirmed that he was not asking Mr. Crawford to take any kind of action or change "any kind of policy." (Tr. 74-75).[21] He confirmed that the comment was not spurred or instigated by his frustration or anger with not receiving a tip the previous year, testifying that "I wasn't upset . . . I was happy to do the job. It was part of my job." (Tr. 74) In fact, Mr. Greenidge summarized his purportedly protected activity as "*It was just a comment that I made.*" (Tr. 75).

Regardless of whether or not the comment Mr. Greenidge made tangentially was related to his tipped wages (over which Respondent has no control and thus was not a term and condition of employment), *Mr. Greenidge testified clearly that he was not seeking mutual aid or protection*, nor could any reasonable person infer that from "just [this] comment." This is not a

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[20] Respondent presumes that General Counsel is not arguing Mr. Greenidge had the right to refuse or threaten to refuse to assist the Lufthansa passengers.

[21] The transcript notes Mr. Greenidge responded "I wasn't taken in about that" to Judge Green's question "It doesn't sound to me like you were asking Mr. Crawford to do anything one way or the other, whether he should change any kind of policy[?]" (Tr. 75). In light of the frequent typographical errors throughout the transcript, we submit that "taken in" should read "talking."

situation where employees were discussing their wages – conversations that are necessary to, for example, determine whether the employer is paying its employees disparately or whether the employees are underpaid – this was a stray comment that Mr. Greenidge made, apparently, "just" because. Absent a showing that the comment was protected – i.e., intended to improve or otherwise redress the employees terms and conditions of employment – a stray comment is not protected by the Act simply because he mentioned the word "tip".

CONCLUSION

As set forth above and in ALJ Green's decision, General Counsel failed to establish that Mr. Greenidge's stray remark about tips was protected concerted activity and thus failed to establish that Respondent violated Section 8(a)(1) of the Act. Thus, the decision dismissing the Complaint in its entirety should be upheld.

Respectfully submitted,

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Melville, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ALSTATE MAINTENANCE, LLC

and Case No. 29-CA-117101

TREVOR GREENIDGE, an Individual.

LOCAL 660, UNITED WORKERS OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2016, I served a true copy of **Respondent's Answering Brief To General Counsel's Exceptions To The Decision of the Administrative Law Judge** *via* the National Labor Relations Board's electronic filing service on:

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